82-1866
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN FAKTER and RELIABLE SHEET METAL WORKS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Is a motion to set aside a conviction, brought pursuant to Rule 32(d), addressed to the discretion of the district court judge when the motion is brought to remedy the failure of the court, prior to accepting a guilty plea, to adequately inform a mentally ill defendant of the charges or to ascertain that the charges were understood.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, by their attorney, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a denial of their motions to vacate their convictions.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit in this case is unreported, pursuant to Circuit Rule 35, and is reproduced in the appendix.

The order of the district court is unreported and is reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 17, 1983. This Court's jurisdiction is involved under 28 U. S. C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

Pursuant to Supreme Court Rule 21.1(f) the following constitutional provision, rules and statutes are set forth in the appendix:

Rules of Criminal Procedure, Rule 11(c)
Rules of Criminal Procedure, Rule 32(d)
28 U. S. C. sec. 2255
United States Constitution, Fifth Amendment

STATEMENT OF FACTS

On July 12, 1979, Petitioner Melvin Fakter, on behalf of himself and on behalf of Petitioner Reliable Sheet Metal Works, Inc., moved to withdraw their pleas of not guilty and to enter pleas of nolle contendre to two counts of the thirteen court indictment which had been pending against them since June, 1978. Count One of this indictment was nine pages long, consisted of seven topical headings, including a full page of definitions and charged, in sixteen paragraphs, eighteen corporations, thirteen individuals and a labor union with a conspiracy, of at least thirteen years duration, to unreasonably restrain trade and commerce in violation of 15 U. S. 1. Counts two through thirteen charged eighteen corporations and eleven individuals with devising and participating in a thirteen year scheme to defraud various local government entities in the soliciting of bids for public construction projects. Numerous acts were alleged to have been performed by the co-schemers in furtherance of the alleged schemes which caused certain mailings by one of the local government entities in violation of 18 U.S.C. 1341.

After being advised that Fakter was under the care of a physician and a psychiatrist, the trial court delegated to the prosecutor the responsibility of advising Fakter of the charges against him. The prosecutor stated:

> Count I charges a conspiracy to rig bids and allocate sheet metal jobs in the Chicago area from at least 1963 into at least 1976. The defendant Fakter was a regular participant in this conspiracy and attended numerous allocation meetings. Count I carries a maximum penalty of defendant Fakter of 3 years imprisonment and/or a fine of $100,000.
>
> Count VIII alleges a violation of the mail fraud statute and charges a mailing in furtherance of this conspiracy respecting a 1975 allocating job.
>
> As to the defendant Fakter, the maximum penalty is five years of imprisonment and/or a $1,000 fine.

As to the defendant Reliable Sheet Metal, Inc., the maximum penalty as to Count I is a $1 million fine, and as to Count VIII a $1,000 fine.

The district judge, then asked Fakter if he understood that these were the charges to which he was pleading and Fakter answered yes.

At the time of the plea Fakter was suffering from the mental illness, major depressive episode. Fakter's treating physician and treating psychiatrist, as well as a psychiatrist retained by the government to advise the prosecutor whether incarceration was an appropriate sentence all agreed that Fakter was suffering from this illness.[1] All the medical witnesses agreed that this illness was characterized by severe mental pain and symptoms of the illness included slowness of thought.[2] Each of the physicians stated that those suffering from the illness often committed acts which were not in their best interest in an attempt to stop the emotional pain.[3] All the doctors acknowledged that a change of plea in a criminal case could be such an act.

Over a period of months prior to the change of plea, Fakter's attempted to close Reliable Sheet Metal Works and disposed of his property in a foolhardy manner. Fakter's psychiatrist advised Fakter's wife that Fakter was unable to manage his affairs and that Fakter should be hospitalized. Fakter finally committed himself to the Northwestern Memorial Hospital, Psychiatric Institute in Chicago, Illinois. However, after one day, Fakter left without authorization.

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[1] The government's psychiatrist advised that incarceration would cause Fakter's condition to become more serious.

[2] All of the doctors recognized that the American Psychiatric Institute, *Diagnostic and Statistical Manual III*, (1978) pgs. 210-215 was authoritative in diagnosing the illness major depressive episode.

[3] The medical witnesses differed in their opinions as whether Fakter suffered from the delusional symptoms of his illness. The government psychiatrist rendered an opinion that Fakter was rational. However, this psychiatrist stated that suicide to escape emotional pain was a rational act.

Thirteen days later, without conferring with Fakter's doctors, Fakter's attorney tendered the nolle contendre pleas on behalf of Fakter and Reliable Sheet Metal Works. The attorney advised the trial court that Fakter was suffering from a severe medical condition but the attorney believed Fakter was orientated as to time and place. No inquiry was made as to the nature of this severe medical condition.

On September 14, 1979, after receiving reports from each of the physicians, as well as, numerous letters from Fakter's business associates, friends and employees commenting on Fakter's changes in appearance and behavior, the trial court found that Fakter was mentally ill.[4] The court then placed Fakter on three years probation and imposed a fine of one hundred fifty thousand dollars on Reliable Sheet Metal Works, Inc.

In June, 1981, the petitioners filed, pursuant to Rule 32(d), motions to vacate their convictions. The petitioners contended that Fakter was incompetent at the time of the plea. Further, it was contended that Fakter was not adequately advised of the charges nor was it ascertained that he understood the charges before the pleas were accepted as required by Rule 11(c) and the Due Process Clause of the Fifth Amendment.

After a hearing on the motions, the trial court held that Fakter was competent at the time of the pleas. The decision further held the statement of the prosecutor adequately advised the petitioners of the charges against them and the court's inquiry fulfilled the requirement that the court ascertained whether the defendant understood the charges.

On March 17, 1983, the Seventh Circuit affirmed. However, rather than decide the issues presented, it was held that the re-opening of the plea under Rule 32(d) is allowed only "to correct a manifest injustice" and the decision of the district court could only be reversed upon a finding of an abuse of discretion.

---

[4] None of these individuals had been instructed to write concerning Fakter's illness.

REASONS FOR GRANTING THE WRIT

This case presents the important and recurring question of whether a Rule 32(d) motion to set aside a conviction after sentencing is always addressed, regardless of grounds, to the trial court's discretion. Here, the motion was predicated upon the petitioner Fakter's mental condition at the time the nolle contendre pleas were accepted and upon the failure of the court below to adequately advise Fakter of the nature of the charges or to ascertain that the charges were understood as required by Rule 11(c) and by the Due Process Clause of the Fifth Amendment.

The petitioners contended that Fakter was not adequately advised of the complex anti-trust and mail fraud offenses nor of the important elements of the charges. It was further contended that the inquiry as to Fakter's understanding of the charges was insufficient. *Henderson* v. *Morgan,* 426 U. S. 631 (1976); *McCarthy* v. *United States,* 394 U. S. 459 (1969); *Smith* v. *O'Grady,* 312 U. S. 329 (1941).

The Seventh Circuit affirmed the denial of petitioners' motions but in doing so did not decide the issues presented. Rather, relying on its previous decision, *United States* v. *Mack,* 249 F. 2d 421 (7th Cir. 1957), the court below held that a Rule 32(d) motion is only allowed "to correct a manifest injustice" and a decision denying a Rule 32(d) motion is reviewable only upon an abuse of discretion.

The decision below confuses the fact that the concept of "manifest injustice" is broader than the requirements of due process and when rights guaranteed by the Constitution are not involved the district court has discretion to correct a "manifest injustice." *Nagelburg* v. *United States,* 377 U. S. 266 (1964); *United States* v. *Kent,* 397 F. 2d 446 (7th Cir. 1968); *United States* v. *Washington,* 341 F. 2d 277 (3d Cir. 1965). However, the decision below, is in conflict with the decisions of at least three other Circuits which have held that a Rule 32(d) motion

brought to correct due process violations which occur during a change of plea are not addressed to the court's discretion. These decisions have reasoned that a violation of due process is a "manifest injustice" as a matter of law and, therefore, the motion is not discretionary. *United States* v. *Crusco*, 536 F. 2d 21 (3d Cir. 1976); *United States* v. *McCahy*, 449 F. 2d 738 (9th Cir. 1971); *United States* v. *Cody*, 438 F. 2d 287 (8th Cir. 1971). These decisions which do not equate "manifest injustice" with discretion are more consistent with the fact that the Federal Rules of Criminal Procedure are to be construed to secure simplicity in procedure and fairness in administration. *Fallen* v. *United States*, 378 U. S. 139 (1964). Had petitioners sought relief by filing formal petitions, pursuant to 28 U. S. C. § 2255, review of the district court's decision would have been on the issues presented and not merely on whether any discretion had been abused. *Davis* v. *United States*, 417 U. S. 333 (1974). However, 28 U. S. C. § 2255 does not afford a remedy to petitioner Reliable Sheet Metal Works, Inc. 28 U. S. C. § 2255 provides only a remedy commensurate with habeas corpus and does not lie for one not in custody. *Hill* v. *United States*, 368 U. S. 333 (1962). 28 U. S. C. § 2255 is not an available remedy for a corporation even when the corporation's constitutional rights are violated. A simple and fair remedy should be available under the Federal Rules of Criminal Procedure.

The decision below conflicts with the holding in *United States* v. *Watson*, 548 F. 2d 1058, 1064 (D. C. Cir. 1977). There, the court analyzed the relief available, when the constitutionality protected requirements of Rule 11(c) are violated, under both 28 U. S. C. § 2255 and under Rule 32(d). The court concluded:

> "Under these circumstances it would seem but the part of common sense to consider and dispose of under Rule 32(d) all requests for collateral relief in the form of withdrawal of a guilty plea."

This Court should resolve the issue of the proper procedure for obtaining collateral relief from a defective guilty plea by holding that a simple Rule 32(d) motion is the appropriate procedure and that the phrase "manifest injustice" does not render all such motions subject to the district court's discretion.

CONCLUSION

For the reasons discussed above, this Court ought to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the court's judgment in the instant case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(ARGUED: FEBRUARY 11, 1983)

March 17, 1983

Before

Hon. WALTER J. CUMMINS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 82-2160 and 82-2161 *vs.*

RELIABLE SHEET METAL WORKS, INC. and MELVIN FAKTER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 CR 388

Stanley J. Roszkowski,
Judge.

ORDER

This is an appeal from an order of the United States District Court for the Northern District of Illinois, District Judge Stanley J. Roszkowski, denying the defendants' Rule 32(d) motion to set aside their *nolo contendere* pleas entered on July 12, 1979. We affirm the order of the district court.

This case stems from an indictment returned in August of 1977 against thirty-one defendants accused of conspiracy to fix bids and allocate contracts on public construction projects. The defendants in the case before us were alleged to be participants in this bid-rigging conspiracy.

Appellant Fakter apparently suffered physical and mental impairments as a result of being named in the indictment. At the time of his indictment, and the hearings and proceedings connected with that indictment, he was under the care of both his family physician and a psychiatrist. Appellant seeks in the proceeding now before us to set aside his *nolo contendere* plea on the grounds that he neither fully understood the nature of the charges against him before entering his plea nor was mentally competent at the time his plea was entered.

Before the original acceptance of the *nolo contendere* plea, the district court conducted a hearing to explore the issue whether the defendant was both aware of the charges against him and entering his plea knowingly and voluntarily. This hearing is a critical aspect of any proceeding where the competency of a defendant is at all in question. The district judge has an obligation to carefully explore whether a defendant who is before him has the ability to comprehend and respond to the proceedings around him. The traditional requirements surrounding criminal responsibility are fundamentally premised on the concept of a defendant who is both fully aware of, and an active participant in, the proceedings of the judicial system to evaluate guilt and mete out punishment.

We find that the district court's procedure in this case fulfilled its obligation. The transcript of the district court's hearing on July 12, 1979, reflects the district judge's effort to assure that the *nolo contendere* plea being entered before him was both knowlingly and competently being entered into. The district court's written order, dealing with the Rule 32(d) motion now before us, carefully analyzes the evidence of the appellant Fakter's knowledge of the charges and competency at the time his plea was entered. The re-opening of a plea under Rule 32(d), which is sought by appellants, is allowed only to "correct manifest injustice," and we will reverse a decision of the district court on a Rule 32(d) motion only if there has been an abuse of the district court's discretion. *United States v.*

Mack, 249 F.2d 421 (7th Cir. 1957). We find no substantial evidence which would indicate either that the district court abused its discretion or that the court's order is incorrect.

The district court's order is premised upon two key factual determinations: that Fakter had sufficient knowledge of the charges against him and that Fakter was competent to make his under The district court's findings of fact must be reviewed under the "clearly erroneous" standard, and we are particularly reluctant to reverse factual determinations based upon judgments of the credibility of witnesses. *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F. 2d 477 (7th Cir. 1980); *United States v. Holmes*, 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972). Judgments as to the credibility of psychiatric witnesses are particularly crucial in this matter, and we find that the district court's assessment of this testimony, and of the other evidence in the case, was not clearly erroneous.

The order of the district court is therefore affirmed and adopted as part of this order.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* MELVIN FAKTER and RELIABLE SHEET METAL WORKS, INC., et al., *Defendants.*	No. 78 CR 388

ORDER

Before the court is the defendants' Rule 32(d) motion to set aside the *nolo contendre* pleas entered on July 12, 1979. For the reasons stated herein, defendants' motion is denied.

In August of 1977, the grand jury returned a thirteen count indictment against the defendants, Melvin Fakter, and his company, Reliable Sheet Metal Works, Inc. The indictment charged that the defendants had engaged in a conspiracy to fix bids on public construction projects.

On July 12, 1979, the defendant, pursuant to a plea agreement, entered *nolo contendre* pleas on Counts I and VII of the indictment. Before accepting the change of plea, this court conducted a hearing to determine whether the pleas were knowledgeable, voluntary, and with a basis in fact that satisfies all of the elements of the crime charged.

At the beginning of the hearing, the court learned that Melvin Fakter was under the care of a psychiatrist.

> THE COURT: Are you presently or have you recently been under the care of a physician or psychiatrist?
>
> MR. FAKTER: Yes, sir, I have.

THE COURT: A physician or a psychiatrist, which one?

MR. FAKTER: Both, sir.

THE COURT: Both. How recently?

MR. FAKTER: It's going on right now.

THE COURT: Have you even been hospitalized or treated for a narcotic condition.

MR. FAKTER: No, sir.

THE COURT: Are you presently under the influence of any narcotic, including alcohol?

MR. FAKTER: No. I had some medication recently, but nothing—

THE COURT: How recently, today?

MR. FAKTER: Not today.

MR. ANDREW: Actually I believe it was two days ago.

THE COURT: That was prescribed by your physician?

MR. FAKTER: Yes.

(Transcript of July 12, 1979 Hearing [hereinafter referred to as "Tr. ____"]).

Defense counsel indicated, however, that the Fakter's psychiatric condition was not severe enough to interfere with the defendant's understanding of the proceedings. Defense counsel stated that:

> I believe he fully understands it [the indictment]. I believe he is totally oriented to the time, place and people at this time, and that he is fully able to cooperate with counsel, although he is under some disability.

(Tr. 7). Fakter also stated that he understood the proceedings. When asked by the court "You thoroughly understand what the proceedings are today?", the defendant answered "Yes." *Id.*

The court then asked the United States Attorney to explain the charges in Counts I and VII. The United States Attorney explained that:

> Count I charges a conspiracy to rig bids and allocate public sheet metal jobs in the Chicago area from at least 1963 into at least 1976.
>
> The defendant Fakter was a regular participant in this conspiracy and attended numerous allocation meetings.
>
> Count I carries a maximum penalty of defendant Fakter of three years imprisonment and/or a fine of $100,000.
>
> Count VIII alleges a violation of the mail fraud statute and charges a mailing in furtherance of this conspiracy respecting a 1975 allocating job.
>
> As to the defendant Fakter, the maximum penalty is five years imprisonment and/or a $1,000 fine.
>
> As to defendant Reliable the maximum penalty as to Count I is a $1 million fine, and as to Count VIII as $1,000 fine.

(Tr. 6). After the explanation, the defendant stated that he understood the charges and defense counsel indicated that he had explained the charges to his client. (Tr. 6-7).

After a series of questions concerning other matters not relevant to this particular motion,[1] this court accepted the *nolo*

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[1] The court's other inquiries elicited the following information from Melvin Fakter: he was not under the influence of narcotics or alcohol (Tr.4); he had reviewed the indictment (Tr. 5); he consulted with his attorney about the indictment (Tr. 5); he was satisfied with his attorney's representation (Tr. 5); he waived his right to have the indictment read in open court (Tr. 5); his attorney had explained the nature and essential elements of the charges to him (Tr. 6); he was able to fully cooperate with counsel (Tr. 7); he understood that, absent his plea, he was entitled to a public trial by jury in which he would have counsel, the right to call witnesses, the right to participate in the selection of a jury, the privilege against self-incrimination, and the benefit of the presumption of innocence (Tr. 8-9); his plea was not the result of threats or promises (Tr. 10); and he understood that the court was not a party to the plea negotiations with the government (Tr. 10-11).

contendre pleas and entered a finding that the pleas were knowledgeable, voluntary, and had a basis in fact showing that all of the elements in the charged offense had been satisfied.

In preparation for sentencing, the court ordered the preparation of a presentence report. Also, due to the fact that Mr. Fakter was receiving psychiatric care, the court asked that the defendant's psychiatrist send a letter to the court concerning the effects incarceration would have on the defendant's condition. To insure a balanced report, the court ordered that the defendant also be examined by a psychiatrist chosen by the government and he too would submit a report to the court.

In a letter dated September 14, 1979 Dr. Blackmun, defendant's treating psychiatrist, informed the court that Mr. Fakter was indecisive at work, had lost interest in all activities, was too irresponsible to make major financial decisions, and was suffering from a psychotic depressive reaction. Dr. Blackmun advised the court that "incarceration would only aggravate his [Melvin Fakter's] condition, hasten his decline and require hospital treatment."

Dr. Spector, the court appointed psychiatrist, also found that Mr. Fakter was depressed. In a report to the court dated September 1, 1979, Dr. Spector noted that:

> Melvin Fakter has a clinically apparent depression marked by depressed mood, inability to experience pleasure, change in appetite, weight loss, insomnia, loss of energy, decrease in sexual interest, loss of interest in work, feelings of embarrassment, diminished ability to think or concentrate, anxiety, and bodily complaints. He sighed, had a sad facial expression, and presented himself as one with low self-esteem. He reported no prior depressions and sees this as reactive to the indictment.

Dr. Spector did state, however, that Mr. Fakter "is able to think abstractly and his judgment appeared to be unimpaired."

On the question of incarceration, Dr. Spector shared Dr. Blackmuns concern that incarceration would only worsen Mr. Fakter's condition. He explained that:

> Sustained incarceration would not be medically advisable. Specifically, confinement, be it incarceration or hospitalization, tends to intensify and focus psychiatric symptomatology. His depression would probably deepen, his withdrawal become more severe, and his limited ability to function become even more reduced.

After reviewing the reports, this court followed the psychiatrists' recommendation and imposed a sentence of three years probation on condition that Melvin Fakter engage in community service. The court also imposed a fine of $150,000 on defendant, Reliable Sheet Metal Works, Inc.

Approximately two years after sentencing, the defendants moved to vacate the *nolo contendre* pleas. First, Fakter argued that the charges to which he plead were not fully explained to him as Rule of Criminal Procedure 11 requires. Second, the defendant argued that his mental condition at the time rendered him unable to knowingly and competently enter a plea.

The court conducted a hearing on the motion to set aside the pleas. The key witnesses were Drs. Blackmun and Spector, who had both examined Mr. Fakter prior to sentencing. The court viewed their testimony as crucial because their examinations of Fakter took place immediately prior to sentencing. These experts were therefore in the best position to observe Fakter's state of mind during the period of time in which he plead *nolo contendre* and was sentenced.

Dr. Blackmun testified that Fakter was unable to make a reasoned decision when he entered the *nolo contendre* pleas. Dr. Blackmun believed that Mr. Fakter suffered from a major depressive episode. This condition diminishes the patient's ability to think or concentrate, causes a feeling of worthlessness, and motivates a patient to eliminate at any cost the cause of his depression and discomfort. In this testimony and in his letter to

the court, Dr. Blackmun concluded that Fakter was unable to cooperate with counsel and "could not reason properly about his plea of *nolo contendre* because he was suffering from a psychotic mental disorder in which reality-testing was grossly impaired."

Dr. Spector testified that Fakter was neither psychotic or delusional, and was able to choose among the alternatives available to him. In his report to the court, Dr. Spector stated that "Mr. Fakter understood the nature of the proceedings, both factual understanding of what was taking place as well as rational understanding of what was taking place." Dr. Spector adds that "his ability to make a rational decision as to pleading *nolo contendre* was based on the ability to understand the nature of that specific plea, the consequences of that specific plea, and the alternatives to that specific plea." Fakter also "appeared able to communicate relevantly with his own counsel."

Other witnesses at the hearing included Dr. Hilker (Fakter's family physician), Mrs. Fakter, Mr. Andrew (Fakter's attorney at the time of the plea), and Mr. Sabatine, Reliable Sheet Metal's shop foreman. Mrs. Fakter and Mr. Sabatine, testified that Fakter was deeply upset, irritable, preoccupied with the indictment, and had difficulty handling financial and business decisions. Dr. Hilker testified that Fakter was unable to plead competently because he was hurting so bad that he was willing to do anything to eliminate the cause of his pain. Mr. Andrew, defense counsel at the plea, testified that Fakter was always neatly dressed, cooperative with counsel, and in Andrew's opinion "clearly competent."

After carefully considering the testimony and other evidence before the court, this court finds that the defendant was competent when he entered his plea and that the charges were fully explained to the defendant.

Federal Rule of Criminal Procedure 32 provides that a plea is to be set aside only where necessary "to correct manifest injustice." The Seventh Circuit provides this guidance to district courts evaluating a Rule 32(d) motion:

> A motion to set aside a judgment of conviction and withdraw a plea of guilty is, under Rule 32(d) of the Rules of Criminal Procedure, addressed to the sound exercise of the discretion of the District Court. The burden rests upon the defendant to prove the necessity therefor to correct manifest injustice after sentence. The ruling is subject to review on appeal solely as to whether there has been an abuse of discretion.

United States v. Mack, 249 F.2d 421, 423 (7th Cir. 1957) (citations omitted). With these principles in mind, the court finds that neither of the two grounds the defendants assert to set aside the pleas have been proven to the court.

I. THE ALLEGED FAILURE TO INFORM THE DEFENDANT OF THE CHARGES TO WHICH HE PLEAD NOLO CONTENDRE

Federal Rule of Criminal Procedure 11(c)[2] provides that "[b]efore accepting a plea of guilty or nolo contendre, the court of, and determine that he understands . . . the nature of the charge to which the plea is offered.

Three cautionary measures were taken by this court to assure that the charges were explained and understood by the defendant. First, the court had the prosecutor explain the nature of the charges and the maximum penalties they carried.

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[2] The court notes that although *nolo contendre* pleas and guilty pleas are similar, the requirement for accepting a *nolo contendre* plea are less stringent in at least one respect. "Rule 11 does not require that the district court find a factual basis for a plea of *nolo contendre, as opposed to a plea of guilty.*" *United States v. Prince*, 533 F.2d 205, 208 (5th Cir. 1976).

Second, the court inquired of the defendant whether he understood the charges as explained and he answered in the affirmative. Finally, the court asked defense counsel whether he had explained the charges to his client and counsel answered yes.

Defendants, in their motion to set aside the pleas, do not offer a single decision in which these three steps were taken and the plea was nevertheless invalidated on the ground that the explanation of the charges was inadequate.

The fact that the prosecutor described the nature of the charges and the maximum penalty, rather than the court, is not a grounds for error. The Seventh Circuit, in *United States v. Gray,* 611 F.2d 194, 198 (7th Cir. 1979) *cert. denied,* 446 U.S. 911 (1980), *reh. denied* 446 U.S. 960 (1980), has stated:

> . . . [w]e do not consider it error for the prosecutor to describe the nature of the charge and the maximum penalty if the inquiry is done in the presence of the district court and the district court is satisfied that this information has been fully explicated and understood by the defendant.

Nor did the court rely *exclusively* on the assurances of defense counsel when it found that the charges had been fully explained to the defendant. In *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166 (1969), and *Majko v. United States,* 457 F.2d 790 (7th Cir. 1972), error was found because the courts had relied solely upon defense counsel's assurances that the charges had been explained to the defendant and therefore the court made no direct inquiry of the defendant as to whether he actually understood the charges. In this case a direct inquiry was made. In *United States v. Wetterlin,* 583 F.2d 346 (7th Cir. 1978) *cert. denied,* 439 U.S. 1127 (1979), another case defendant cites for the proposition that the court may not rely on the assurances of counsel, neither the prosecutor or the court explained the charges at the plea hearing; the court instead relied upon the assurances of counsel and the fact that the charges were explained to the defendant at the arraignment. Again, the present case is distinguishable because the charges

were explained to the defendant at the plea hearing and the court asked the defendant directly whether he understood the charges.

Finally, the court is not persuaded by defendant's arguments that the prosecutor's explanation of the charges, although given, was insufficient. The prosecutor stated:

> Count I charges a conspiracy to rig bids and allocate public sheet metal jobs in the Chicago area from at least 1963 into at least 1976.
>
> The defendant Fakter was a regular participant in this conspiracy and attended numerous allocation meetings.
>
> Count I carries a maximum penalty of defendant Fakter of three years imprisonment and/or a fine of $100,000.
>
> Count VIII alleges a violation of the mail fraud statute and charges a mailing in furtherance of this conspiracy respecting a 1975 allocating job.
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> As to the defendant Fakter, the maximum penalty is five years imprisonment and/or a $1,000 fine.
>
> As to defendant Reliable the maximum penalty as to Count I is a $1 million fine, and as to Count VIII as $1,000 fine.

Defendant argues that this explanation was inadequate to explain a complex conspiracy and a mail fraud charge which consisted of 14 full pages in the indictment. Defendant notes that in the *Wetterlin* decision, the Seventh Circuit stated that "[t]he charge of conspiracy is not a self explanatory legal term or so simple in meaning that it can be expected or assumed that a lay person understands it." 583 F.2d at 350.

The Seventh Circuit limited its *Wetterlin* ruling, however, noting that the statement about conspiracy "is particularly true of the conspiracy charge *in this case,* which took up 25 pages,

involved 48 paragraphs and 64 overt acts." *Id.* (Emphasis supplied). The Court also stated "[w]e hasten to add that this colloquy between the judge and the defendant as to the nature of the charges will vary from case to case, depending on the peculiar facts of each situation, looking to both the complexity of the charges and the personal characteristics of the defendant, such as his age, education, intelligence, the clarity of his responses, and also whether he is represented by counsel." 583 F.2d at 351. Moreover, it should be noted that the reversal of the plea in *Wetterlin* was not prompted solely by the district court's failure to define conspiracy, rather, the more glaring error was the court's total failure to "mention at the time of the plea hearing the nature of the charges . . . even to describe it generally as a conspiracy." 583 F.2d at 350. That more significant omission did not arise in this case.

Applying the case by case standard set forth in *Wetterlin*, this court finds that the prosecutor's explanation of the conspiracy charge in this case was adequate. The prosecutor explained that Fakter was charged "with a conspiracy to rig bids and allocate public sheet metal jobs." A man in Mr. Fakter's business is well acquainted with the meaning of the term "bid-rigging." The prosecutor then described Mr. Fakter's overt acts in the conspiracy, that he "was a regular participant . . . [and] attended numerous allocation meetings." A successful businessman with years of experience in the industry, possessing three years of education, certainly understood this explanation of the charges. The mere fact that the charge encompassed a large number of pages in the indictment does not transform the essentially simple bid-rigging charge into a complex allegation requiring detailed explanation. Thus, within the context of this particular case, the court finds that the charges were adequately explained.

II. MR. FAKTER'S ALLEGED INCOMPENTENCY TO ENTER A PLEA AT THE TIME OF THE HEARING

A defendant is competent to enter a plea if he has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding and has a rational as well as a factual understanding of the proceedings against him. *United States ex rel. Herald v. Franzen,* 667 F.2d 633 (7th Cir. 1981). *See also Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788 (1960).

The issue of competency essentially depends on whether Mr. Fakter's depressive episode was so severe that he was unable to rationally and factually understand the proceedings. The only two witnesses with the expertise to evaluate mental illness, Drs. Blackmun and Spector, disagree about the severity of Fakter's illness.

The court, in its capacity as a trier of fact, finds the opinion of Dr. Spector to be the most credible. Throughout the case, Dr. Spector has shown independence and consistency in his opinion. When originally asked to evaluate the effects incarceration would have on Mr. Fakter, Dr. Spector insisted that his report reach the court whether or not it supported the government's recommendation of incarceration. True to that independence, Dr. Spector ultimately recommended against the incarceration proposed by the government and in favor of some form of probation. In that same report and recommendation, Dr. Spector noted that Fakter's "judgment appeared to be unimpaired." Thus, at a time when he did not know the compentency issue would ever be disputed, Dr. Spector made a clinical judgment that Fakter's ability to rationally make judgments was unimpaired.

Dr. Blackmun, Fakter's own psychiatrist, never raised the competency issue in his sentencing report to the court. The court believes that if Fakter's depression was so severe as to render him unable to make a reasoned judgment, Dr. Blackmun, as a well-trained psychiatrist, would have been greatly

alarmed and would have raised the competency question in his report to the court. He did not. This leads the court to believe that Mr. Fakter was not suffering from a severe mental illness at the time of the plea, and that Dr. Blackmun's subsequent testimony some two years after the plea is colored by a good-faith desire to help a patient in need.

Further, Dr. Blackmun's own testimony supports the court's finding that Melvin Fakter fully and rationally understood the charges to which he plead. Dr. Blackmun testified that the defendant fully and clearly related to him the charges to which he was pleading *nolo contendre.*

> THE COURT: . . . One other question I have is when he indicated to you on that first visit that he was going into court to enter a plea of nolo contendre, you added something to that in your initial testimony. What was he going to enter a nolo contendre plea to? Did he tell you that?
>
> THE WITNESS: Well, he did tell me in that first interview that he was involved with others for bid rigging.
>
> THE COURT: Would you read back your notes or at least give me your testimony to what your notes reflect to what he told you he was entering a plea to, a nolo contendre plea to?
>
> THE WITNESS: Well, in the beginning he told me that he was indicted with 30 others for bid rigging.
>
> THE COURT: All right.
>
> THE WITNESS: Because he was said to be in collusion with others. Towards the end of the interview he said that he was going to enter a nolo contendre plea, and that was just the fact. I never conceived that—
>
> THE COURT: The nolo contendre plea related to the bid rigging; is that correct? In collusion with others?
>
> THE WITNESS: I think so. Yes.
>
> THE COURT: That's what your notes reflect?
>
> THE WITNESS: Yes.

The other testimony at the hearing is of minor importance. Mrs. Fakter, Mr. Sabatine and Dr. Hilker certainly provided evidence of changes in Fakter's personality—but the severity of the change is a question best evaluated by clinical psychiatrists. Attorney Andrew's observations also carry little weight with the court for the same reason.

The critical testimony therefore is that of Dr. Spector, who examined Melvin Fakter at the time and observed that Melvin Fakter was able to cooperate with counsel and had a factual as well as a rational understanding of what took place. Based on this evidence, the court finds that Melvin Fakter was competent to enter the *nolo contendre* pleas.

Accordingly, defendants' motion to set aside the *nolo contendre* pleas is denied.

Enter:

/s/ STANLEY J. ROSZKOWSKI
Stanley J. Roszkowski, *Judge*
United States District Court

Dated July 7, 1982

Rule 11(c), Federal Rules of Criminal Procedure

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of a special parole term.

Rule 32(d), Federal Rules of Criminal Procedure

(d) A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Title 28 United States Section 2255

Federal custody; remedies on motion attacking sentence. A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

UNITED STATES OF AMERICA

v.

CLIMATEMP, INC.,
EVCO ASSOCIATES, INC.;
GIDEON ENGINEERING CORP.;
MOTO HEATING-VENTILATING-AIR CONDITIONING CORPORATION;
R. A. MARTIN CO., INC.;
RELIABLE SHEET METAL WORKS, INC.;
STEEL CITY VENTILATING & SHEET METAL CO.;
ZACK COMPANY;
ADMIRAL HEATING & VENTILATING, INC.;
BELLIS-HANLEY, INC.;
F. E. MORAN, INC.;
ABBOTT & ASSOCIATES, INC.;
AC COMPANY;
BYNESS, INC.;
HARDY VENTILATING CORPORATION;
MELLISH & MURRAY CO.;
THE NAROWETZ COMPANY;
WAGNER HEATING & VENTILATING CO.;
SHEET METAL WORKERS, INTERNATIONAL ASSOCIATION, LOCAL 73;
ROBERT AHRENHOLD;
STANLEY B. BELLIS;
WILLIAM BLACK;
VICTOR COMFORTE;
JOHN EISELT;
MELVIN FAKTER;
KENNETH GARDNER;
GIDEON GOLDSCHMIDT;
CHARLES L. HOWARD;
RONALD LITT;
RAYMOND J. LYONS;
OWEN A. MORAN; and
RICHARD S. WISE,

Defendants.

CRIMINAL ACTION
NO. 78 CR 388

FILED:

15 U.S.C. § 1, and
18 U.S.C. § 1341

INDICTMENT

The August 1977 Grand Jury charges:

COUNT ONE

I

DEFINITIONS

1. As used herein, the term:

(a) "Sheet metal phase of construction" means sheet metal, ventilation, air conditioning, air handling, and/or dry heat work;

(b) "Sheet metal contractor" means a contractor who performs any sheet metal phase of construction;

(c) "Sheet metal services" means the contracting for and the installation of all work relating to the sheet metal phase of construction at job sites for new construction or for renovation purposes;

(d) "Sheet metal supplies" means products, such as ducts, air filters, central station units, air conditioners, fans, diffusers, coils and ventilation outlets, sold and installed by sheet metal contractors;

(e) "Chicago area" means the counties of Cook, Lake, Du Page and Will in the State of Illinois; and

(f) "Public projects" means construction projects for which public funds have been expended, including, but not limited to, projects of the State of Illinois, Cook County and Chicago Board of Education.

II

DEFENDANTS

2. Each of the corporations named below is hereby indicted and made a defendant herein. Each of these corporate defendants is organized and existing under the laws of the State of Illinois, and, during the period covered by this indictment, had its principal place of business in the city indicated below. During all or part of the period charged in this indictment, and within five years next preceding the return hereof, said defendant corporations engaged in the sheet metal phase of construction as sheet metal contractors in the State of Illinois.

CORPORATION	PRINCIPAL PLACE OF BUSINESS
Climatemp, Inc.	Chicago, Illinois
EVCO Associates, Inc.	Cicero, Illinois
Gideon Engineering Corp.	Skokie, Illinois
Moto Heating-Ventilating-Air Conditioning Corporation	Chicago, Illinois
R. A. Martin Co., Inc.	Maywood, Illinois
Reliable Sheet Metal Works, Inc.	Elk Grove Village, Illinois
Steel City Ventilating & Sheet Metal Co.	Chicago, Illinois
Zack Company	Chicago, Illinois
Admiral Heating & Ventilating, Inc.	Hillside, Illinois
Bellis-Hanley, Inc.	Chicago, Illinois
F. E. Moran, Inc.	Northbrook, Illinois
Abbott & Associates, Inc.	Bloomingdale, Illinois
AC Company	Chicago, Illinois
Byness, Inc.	Melrose Park, Illinois
Hardy Ventilating Corporation	Elk Grove Village, Illinois
Mellish & Murray Co.	Chicago, Illinois
The Narowetz Company	Melrose Park, Illinois
Wagner Heating & Ventilating Co.	Addison, Illinois

3. The individuals named below are hereby indicted and made defendants herein. During all or part of the period charged in this indictment, and within five years next preceding the return hereof, each was associated with one of the defendant corporations in the capacity indicated below.

INDIVIDUAL	CAPACITY	CORPORATION
Robert Ahrenhold	President	Steel City Ventilating & Sheet Metal Co.
Stanley B. Bellis	President	Bellis-Hanley, Inc.
Victor Comforte	President	Climatemp, Inc.
John Eiselt	President	EVCO Associates, Inc.
Melvin Fakter	President and Treasurer	Reliable Sheet Metal Works, Inc.
Kenneth Gardner	President	R. A. Martin Co., Inc.
Gideon Goldschmidt	President	Gideon Engineering Corp.
Charles L. Howard	Vice President and Secretary	Zack Company
Ronald Litt	President	Admiral Heating & Ventilating, Inc.
Raymond J. Lyons	Vice President	Moto Heating-Ventilating -Air Conditioning Corporation
Owen A. Moran	President	F. E. Moran, Inc.
Richard S. Wise	Vice President	Bellis-Hanley, Inc.

4. Sheet Metal Workers, International Association, Local 73, is hereby indicted and made a defendant herein. Sheet Metal Workers, International Association, Local 73, has its principal office in Chicago, Illinois, and is an affiliate of Sheet Metal Workers, International Association whose office is located in Washington, D.C. During all or part of the period charged in this indictment, and within five years next preceding the return hereof, Sheet Metal Workers, International Association, Local 73 provided workers in parts of the Chicago area to sheet metal contractors, including the defendant corporations.

5. William Black is hereby indicted and made a defendant herein. During part of the period charged in this indictment, and within five years next preceding the return hereof, he was president of Sheet Metal Workers, International Association, Local 73.

6. Whenever in this indictment reference is made to any act, deed or transaction of any corporate defendant, such allegation shall be deemed to mean that such corporation engaged in such act, deed or transaction by or through its officers, directors, agents, employees, or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

III

CO-CONSPIRATORS

7. Various firms and individuals, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV

TRADE AND COMMERCE

8. The furnishing and installation of sheet metal services and supplies by sheet metal contractors is a specialized field of business which is engaged in by a limited group of companies that are equipped by technical training and experience to do this type of work, commonly referred to as the sheet metal phase of construction. The sheet metal phase of construction includes, among other things, the installation of duct work that conveys the heating, cooling or ventilating air to various rooms in a building as well as the installation of other sheet metal supplies. Consumers of sheet metal supplies ordinarily do not

install these supplies themselves; this service customarily is performed by a sheet metal contractor who employs and supervises skilled labor for this purpose.

9. Sheet metal supplies and services provided by sheet metal contractors are purchased by customers on a direct basis, through negotiations or through the solicitation of competitive bids. On public projects, the sheet metal phase of construction is usually awarded through the solicitation of competitive bids from sheet metal contractors.

10. Sheet metal contractors in the Chicago area are engaged in the business of selling and installing sheet metal supplies. A substantial part of all sheet metal supplies used in the Chicago area is sold and installed by the corporate defendants. During the period of time covered by this indictment, total revenues derived from the providing of sheet metal supplies and services by the corporate defendants and co-conspirators on public projects in this market exceeded $100 million.

11. Substantial quantities of sheet metal supplies installed by the corporate defendants and co-conspirators were manufactured in states other than Illinois and were sold and shipped regularly in a continuous, uninterrupted stream from their points of origin to their places of installation and use in buildings in the Chicago area. Thus, sheet metal contractors, including the corporate defendants and co-conspirators, were conduits through which sheet metal supplies manufactured in and shipped from states of the United States other than Illinois, were sold to the consuming public in the Chicago area including to owners of public projects which are the subject of this indictment. The actions of the defendants in carrying out the offense charged also had a substantial effect on interstate commerce.

V

OFFENSE CHARGED

12. From at least 1963 and continuing thereafter into at least 1976, the exact dates being unknown to the grand jurors, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. William Black and Sheet Metal Workers, International Association, Local 73 aided, abetted, counseled, and induced said combination and conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 2.

13. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to allocate among themselves the sheet metal phase of construction on public projects in the Chicago area; and

(b) to submit collusive, non-competitive and rigged bids on the sheet metal phase of construction on public projects in the Chicago area.

14. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore charged, they combined and conspired to do, including, among other things:

(a) exchanging information relating to their prospective bids for the sheet metal phase of construction on public projects in the Chicago area;

(b) selecting the low bidder for the sheet metal phase of construction on public projects in the Chicago area; and

(c) submitting intentionally high (complementary) bids or withholding bids on the sheet metal phase of construction on public projects in the Chicago area on which another corporate defendant or co-conspirator had been selected as the low bidder.

VI

EFFECTS

15. The combination and conspiracy charged herein has had the following effects, among others:

(a) price competition in the sale of sheet metal supplies and services on public projects in the Chicago area has been restrained and eliminated;

(b) quotations and bids for sheet metal supplies and services on public projects in the Chicago area have been fixed and rigged at artificial and non-competitive levels; and

(c) purchasers in the Chicago area have been deprived of the benefits of free and open competition in the sale of sheet metal supplies and services on public projects.

VII

JURISDICTION AND VENUE

16. The combination and conspiracy charged herein has been carried out, in part, within the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, within five years next preceding the return of this indictment.

COUNT TWO

The August 1977 Grand Jury further charges:

1. As used herein, the term:

(a) "Sheet metal phase of construction" means sheet metal, ventilation, air conditioning, air handling, and/or dry heat work;

(b) "Chicago area" means the counties of Cook, Lake, Du Page and Will in the State of Illinois; and

(c) "Public projects" means construction projects for which public funds have been expended, including, but not limited to, projects of the State of Illinois, Cook County and Chicago Board of Education.

2. From at least 1963 and continuing thereafter into at least 1976, the exact dates being unknown to the grand jurors,

Climatemp, Inc., Chicago, Illinois;

EVCO Associates, Inc., Cicero, Illinois;

Gideon Engineering Corp., Skokie, Illinois;

Moto Heating-Ventilating-Air Conditioning Corporation, Chicago, Illinois;

R. A. Martin Co., Inc., Maywood, Illinois;

Reliable Sheet Metal Works, Inc., Elk Grove Village, Illinois

Steel City Ventilating & Sheet Metal Co., Chicago, Illinois;

Zack Company, Chicago, Illinois;

Admiral Heating & Ventilating, Inc., Hillside, Illinois;

Bellis-Hanley, Inc., Chicago, Illinois;

F. E. Moran, Inc., Northbrook, Illinois;

Abbott & Associates, Inc., Bloomingdale, Illinois;

AC Company, Chicago, Illinois;

Byness, Inc., Melrose Park, Illinois;

Hardy Ventilating Corporation, Elk Grove Village, Illinois;

Mellish & Murray Co., Chicago, Illinois;

The Narowetz Company, Melrose Park, Illinois;

Wagner Heating & Ventilating Co., Addison, Illinois;

Robert Ahrenhold of Steel City Ventilating
& Sheet Metal Co.;
Stanley B. Bellis of Bellis-Hanley, Inc.;
Victor Comforte of Climatemp, Inc.;
John Eiselt of EVCO Associates, Inc.;
Melvin Fakter of Reliable Sheet Metal Works, Inc.;
Kenneth Gardner of R. A. Martin Co., Inc.;
Gideon Goldschmidt of Gideon Engineering Corp.;
Charles L. Howard of Zack Company;
Ronald Litt of Admiral Heating & Ventilating, Inc.;
Raymond J. Lyons of Moto Heating-Ventilating-
Air Conditioning Corporation;
Owen A. Moran of F. E. Moran, Inc.; and
Richard S. Wise of Bellis-Hanley, Inc.

and others known and unknown to this grand jury, devised and intended to devise a scheme and artifice to defraud governmental entities soliciting bids on public projects within the State of Illinois of:

(a) money; and

(b) their right to open and free competition in the awarding of contracts relating to the sheet metal phase of construction.

3. It was part of the aforesaid scheme and artifice to defraud that the defendants and others known and unknown to this grand jury would and did:

(a) allocate among themselves the sheet metal phase of construction on public projects in the Chicago area; and

(b) submit collusive, non-competitive and rigged bids on the sheet metal phase of construction on public projects in the Chicago area.

4. It was a further part of the scheme and artifice to defraud that the defendants and others known and unknown to this grand jury would and did:

(a) exchange information relating to their prospective bids for the sheet metal phase of construction on public projects in the Chicago area;

(b) select the low bidder for the sheet metal phase of construction on public projects in the Chicago area; and

(c) submit intentionally high (complementary) bids or withhold bids on the sheet metal phase of construction on public projects in the Chicago area on which another participant in the scheme had been selected as the low bidder.

5. Each and every company and individual named in paragraph 2 of this COUNT TWO is named as a defendant in COUNT TWO of this indictment.

6. It was part of the aforesaid scheme and artifice to defraud that defendant Admiral Heating & Ventilating, Inc. was allocated the sheet metal phase of construction on the Cook County public project known as the Work Release Recreation Center, located in Chicago, Illinois, bid in April, 1973. Pursuant to the scheme and artifice to defraud, defendant Admiral Heating & Ventilating, Inc. was awarded this job.

7. On or about June 18, 1973, in the Northern District of Illinois, Eastern Division, the companies and individuals named in paragraph 2 of this COUNT TWO, for the purpose of executing such scheme and artifice to defraud and attempting to do so, did knowingly cause to be delivered by mail by the

United States Postal Service, according to the directions thereon, an envelope containing a Bond and a letter dated June 18, 1973, said envelope being addressed to:

Admiral Heating and Ventilating, Inc.
4159 Butterfield Road
Hillside, Illinois 60162

and which envelope and the contents thereof had been placed in an authorized depository for mail by and on behalf of the County of Cook, State of Illinois: in violation of Title 18, United States Code, Section 1341.

COUNT EIGHT

The August 1977 Grand Jury further charges:

1. Each and every allegation contained in paragraphs 1, 2, 3 and 4 of COUNT TWO of this indictment is here realleged with the same force and effect as though said paragraphs were set forth in full detail.

2. Each and every company and individual named in paragraph 2 of COUNT TWO of this indictment is named as a defendant in COUNT EIGHT of this indictment.

3. It was part of the aforesaid scheme and artifice to defraud that defendant R. A. Martin Co., Inc., was allocated the sheet metal phase of construction on the Cook County public project known as the Fourth District Circuit Court Building, located in Maywood, Illinois, bid in May, 1975. Pursuant to the scheme and artifice to defraud, defendant R. A. Martin Co., Inc. was awarded this job.

4. On or about June 2, 1975, in the Northern District of Illinois Eastern Division, the companies and individuals named in paragraph 2 of COUNT TWO of this indictment, for the purpose of executing such scheme and artifice to defraud and

attempting to do so, did knowingly cause to be delivered by mail by the United States Postal Service, according to the directions thereon, an envelope containing a Bond and a letter dated June 2, 1975, said envelope being addressed to:

The R. A. Martin Co., Inc.
1000 St. Charles Road
Maywood, Illinois 60153

and which envelope and the contents thereof had been placed in an authorized depository for mail by and on behalf of the County of Cook, State of Illinois; in violation of Title 18, United States Code, Section 1341.

[4] MR. FAKTER: F-a-k-t-e-r.

THE COURT: How old are you, Mr. Fakter?

MR. FAKTER: 56 years old.

THE COURT: How much formal education do you have?

MR. FAKTER: Three years of college.

THE COURT: Are you presently or have you recently been under the care of a physician or psychiatrist?

MR. FAKTER: Yes, sir, I have.

THE COURT: A physician or a psychiatrist, which one?

MR. FAKTER: Both, sir.

THE COURT: Both. How recently?

MR. FAKTER: It's going on right now.

THE COURT: Have you ever been hospitalized or treated for a narcotic condition?

MR. FAKTER: No, sir.

THE COURT: Are you presently under the influence of any narcotic, including alcohol?

MR. FAKTER: No. I had some medication recently, but nothing—

THE COURT: How recently, today?

MR. FAKTER: Not today.

MR. ANDREW: Actually I believe it was two days ago.

THE COURT: That was prescribed by your physician?

MR. FAKTER: Yes.

THE COURT: Have you received a copy of the indictment [5] in this case?

MR. FAKTER: Yes, sir, I have.

THE COURT: Have you had an opportunity to go over the indictment and to consult with your attorney, Mr. Andrew, about your indictment?

MR. FAKTER: Yes, sir, I have.

THE COURT: Are you satisfied with the representation given to you by your attorney?

MR. FAKTER: Yes, sir.

THE COURT: You know that you have a right to have the indictment read in open court or you can waive that, that is, give up the reading of the indictment in open court. Do you wish to have it read in open court?

MR. FAKTER: No, sir.

THE COURT: So you do specifically give up or waive your right to have the indictment read in open court; is that true?

MR. FAKTER: Yes.

THE COURT: I would like the United States Attorney to briefly explain the charges in these two counts.

MR. FEIVESON: Count I charges a conspiracy to rig bids and allocate public sheet metal jobs in the Chicago area from at least 1963 into at least 1976.

The defendant Fakter was a regular participant in this conspiracy and attended numerous allocation meetings.

Count I carries a maximum penalty of defendant [6] Fakter of three years imprisonment and/or a fine of $100,000.

Count VIII alleges a violation of the mail fraud statute and charges a mailing in furtherance of this conspiracy respecting a 1975 allocating job.

As to the defendant Fakter, the maximum penalty is five years imprisonment and/or a $1,000 fine.

As to defendant Reliable the maximum penalty as to Count I is a $1 million fine, and as to Count VIII a $1,000 fine.

THE COURT: I would like the defendant to state your understanding of the charges to which you are pleading today. Do you understand what you are pleading to in these two counts? As best you can. You have heard what the United States Attorney said about the charges.

MR. FAKTER: Yes, I understand that.

THE COURT: You understand those are the charges you would be pleading nolo contendre to?

MR. FAKTER: Yes, sir.

THE COURT: Have the nature and the essential elements of those charges been explained to you by your attorney, Mr. Andrew?

MR. FAKTER: Yes, they have.

THE COURT: Mr. Andrew, you have explained the charges to which he is pleading today?

MR. ANDREW: That's correct.

[7] THE COURT: You have gone over the plea agreement with him?

MR. ANDREW: Such as it is. It is not a formal agreement.

THE COURT: I understand it isn't formal. Would you explain to the court substantially any terms that you haven't already represented to the court?

MR. ANDREW: We represented all the terms. I might indicate to the court Mr. Fakter has been under a severe medical condition actually as a result of this indictment.

We have over the last month explained and talked about and gotten him to relate to us what he understands to be happening here today.

THE COURT: Do you think he clearly understands the consequences?

MR. ANDREW: I believe he fully understands it. I believe he is totally oriented to the time, place and people at this time, and that he is fully able to cooperate with counsel, although he is under some disability.

THE COURT: Is that true, Mr. Fakter?

MR. FAKTER: That's true.

THE COURT: You thoroughly understand what the proceedings are today?

MR. FAKTER: Yes. Can I ask my attorney a question?

THE COURT: Yes.